SUPREME COURT, U. S.
SEP 30 1967

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 566

ROYAL AMERICAN INDUSTRIES, INC. and JOHN D. MacARTHUR,

Petitioners,

v.

DOLORES K. MURPHY, et al.,

Respondents.

On Petition for a Writ of Certiorari To the District Court of Appeal of the State of Florida, Fourth District

BRIEF FOR RESPONDENTS IN OPPOSITION

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On Petition for a Writ of Certiorari To the District Court of Appeal of the State of Florida, Fourth District

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether sufficient reason exists for this Court to review a decision of a state intermediate appellate court, which rested upon the construction of a contract, when the purported federal question urged as a predicate for this Court's jurisdiction was first raised below on petition for rehearing before the state court of last resort.

STATEMENT

Petitioners' statement is argumentative, incomplete and in material respects inaccurate and misleading.

A. THE FACTS

Respondents were the controlling stockholders of the Fort Pierce Port & Terminal Co. Petitioner John A. MacArthur was president and a substantial stockholder of Petitioner Royal American Industries, Inc.

On August 1, 1962, Royal American, MacArthur, Terminal Co. and Respondents entered into a written agreement whereby Respondents agreed to exchange 1,293,980 shares of their Terminal Co. stock on a basis of three shares of Terminal Co. for one share of Royal American stock. (R. Vol. I, pp. 60-67).[1]

This Agreement contained the following provisions:

> (4) That ROYAL AMERICAN further agrees that it will cause the stock to be transferred to said STOCKHOLDERS to be registered with the American Stock Exchange without reservation or restriction in order that said stock may be freely exchanged or traded thereon. ROYAL AMERICAN further agrees that if it becomes necessary it will register or cause to be regis-

[1]Respondents shall use "R" to refer to the record filed with this Court at the October Term, 1967, and "A" to refer to the Appendix of this brief of Respondents.

tered said stock with the Securities Exchange Commission and such other governmental agency as may be required. ROYAL AMERICAN further agrees that if it is unable to procure such registration as is required in accordance with the terms of this agreement it will pay to the said STOCKHOLDERS the sum of $2.50 per share of ROYAL AMERICAN stock called for under the terms of this agreement.

(5) ROYAL AMERICAN further agrees to proceed with the registration within sixty days from date of the closing of this transaction, and to proceed with such registration continuously and diligently. ROYAL AMERICAN further agrees that if said registration is not completed within six months from the date of the closing of this transaction it will pay to the STOCKHOLDERS the sum of $2.50 for each share of ROYAL AMERICAN stock. . . . (R. Vol. I, p. 61).

At the closing on November 7, 1962, the certificates of Royal American stock which were delivered to Respondents bore a restrictive legend to the effect that the shares had been acquired for investment, had not been registered under the Securities Act of 1933, and could not be transferred in the absence of an effective registration statement under that act. (R. Vol. I, p. 8).

Also, at the closing each respondent signed a receipt commonly referred to as an investment letter which, in

addition to referring to the agreement and the particular securities being exchanged, contained the following paragraph:

> This will acknowledge that I have represented to and agreed with you that I am purchasing such shares for investment with no present intention of selling or otherwise disposing of same, *subject only to my rights under such Agreement and Addendum.*[2] (R. Vol. I, pp. 53-58; A. 19).

The Royal American stock was not registered with the American Stock Exchange or the Securities and Exchange Commission within six months so as to become freely exchangable or tradeable on the American Stock Exchange. (R. Vol. I, pp. 105-108; Petition, Appendix B, p. 21).

The Respondents thereupon made demands upon Royal American and MacArthur to comply with the agreement and to buy back their Royal American stock at $2.50 per share. Royal American and MacArthur refused to comply with the demands and this litigation ensued.

B. THE PROCEEDINGS IN THE TRIAL COURT

This action was instituted by the filing of a Complaint in the Circuit Court for Palm Beach County, Florida, by Royal American. (R. Vol. I, pp. 1-22). The Respondents filed responsive pleadings seeking specific performance of paragraph 4, 5 and 23 of the agreement. (R. Vol. I, pp. 23-47).

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[2] All emphasis is ours unless otherwise indicated.

At a pretrial conference the parties entered into a Stipulation whereby Royal American withdrew its Complaint and the litigation proceeded on the Counterclaim of the Respondents. Thereafter, the Respondents were referred to as plaintiffs and the Petitioners were referred to as defendants. (R. Vol. 11, p. 3).

A further stipulation arrived at during the pretrial conference resulted in a delineation of the issues upon which the action was to be tried. (R. Vol. II, p. 6-8). More specifically, the Petitioners' attorney, Mr. Pruitt, stipulated these issues to be:

> MR. PRUITT: Yes, I said broadly stated, I think it is better to just tear it down to the — say that the issues on behalf of them, that we failed to comply with the contract, and we are talking about paragraphs four and five of the contract. We failed to comply.
>
> MR. GOLDMAN: Plus 23, which is MacArthur as guarantor.
>
> MR. PRUITT: Four, five and 23. We failed to comply with those provisions of the contract. Our answer thereto is we complied, number one. Number two, is that there was misrepresentation in inducing us to enter into paragraphs four, five and 23; that they hindered or prevented us from complying with paragraphs four, five and 23 and/or that they waived any rights that they might have had under four, five and 23. (R. Vol II, pp. 6-7).

The matter was then tried on the stipulated issues. The trial court found that Royal American had not complied with the agreement and would be liable, under paragraph (5) of the agreement, to repurchase the shares, but for the fact that said contract was modified in writing at the closing by the investment letters. (R. Vol. I, pp. 105-108; pp. 53-59). Significantly, the Final Decree was devoid of any reference to federal law. The decision was based only upon the Chancellors' construction of the contract and the application of principles of contract law.

C. THE PROCEEDINGS IN THE DISTRICT COURT OF APPEAL

The Respondents thereupon appealed the Final Decree to the District Court of Appeal of Florida, Fourth District.

In their appeal, the Respondents urged that the Trial Court had correctly construed the agreement but had erred in its finding that the agreement had been modified at the closing. (R. Vol. I, pp. 111-113; A. 14-15). The Petitioners attempted to sustain the Trial Court's finding upon the sole ground that the evidence supported the decree. Again, as shown by Petitioners' Brief to that Court, they made no reference to federal law. (A. 11-13).

In its opinion, the District Court of Appeal held that the agreement had not been modified at the closing, and, further, that there was no evidence in the record to sustain the Petitioners' affirmative defenses of waiver and estoppel. As the Court's opinion reflects, its decision was based entirely upon applicable Florida law and did not involve any purported federal question or issue.

Accordingly, the District Court of Appeal reversed the Trial Court with directions that a decree be entered requiring Royal American, and upon its failure to perform, John D. MacArthur, to purchase the stock from the Respondents at a price of $2.50 per share. (R. Vol. IV, p. 4; Petition, Appendix B, p. 23).

A Petition for Rehearing before the District Court of Appeal by Royal American and MacArthur was denied without opinion. (R. Vol. IV; A. 3).

D. THE PROCEEDINGS BEFORE THE SUPREME COURT OF FLORIDA

The Petitioners then made application to the Florida Supreme Court for a writ of certiorari to the Florida Fourth District Court of Appeal urging that the lower Court's decision was in conflict with a decision of another District Court of Appeal or of the Florida Supreme Court. Again, the Petitioners did not urge federal law. To the contrary, the Petitioners expressly recognized in their Brief that the District Court of Appeal had ruled on all three of their defenses, to-wit: modification, estoppel and waiver. (A. 10).

The Florida Supreme Court denied the Petition stating that it was without jurisdiction. (R. Vol. IV, p. 7; A. 2). Petitioners then made application to the Florida Supreme Court for rehearing. As a last resort, they included in their Petition an argument that to require Petitioners to buy back their own stock, pursuant to the terms of the agreement, would necessarily constitute a violation of the Securities Act of 1933.

The Florida Supreme Court denied the Petition for Rehearing without opinion. (R. Vol. IV, p. 8; A. 1).

REASONS FOR DENYING THE WRIT

1. A FEDERAL QUESTION WHICH IS FIRST RAISED ON PETITION FOR REHEARING BEFORE A STATE COURT OF LAST RESORT IS NOT TIMELY RAISED AND, THEREFORE, DOES NOT PROVIDE A BASIS UPON WHICH THIS COURT MAY ACQUIRE JURISDICTION TO REVIEW A DECISION OF A STATE COURT.

A long settled principle to which the Supreme Court of the United States has rigidly adhered is that it has no jurisdiction to review a judgment of a state court unless it affirmatively appears on the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by the state court. *Whitney* v. *State*, 274 U. S. 357, 360 (1927); see also *Simmerman* v. *State*, 116 U. S. 54 (1885). Accordingly, it has been held on numerous occasions that when a federal question is first raised on a motion for rehearing before a state court of last resort and that court denies the motion without opinion, then it is not seasonably raised and there is no basis for review by the Supreme Court of the United States. See, e.g., *Hanson* v. *Denckla*, 357 U. S. 235, 243-244 (1958); *Radio Station WOW* v. *Johnson*, 326 U. S. 120, 128-29 (1945); and *Herndon* v. *State*, 295 U. S. 441, 443 (1935).

The case at bar falls squarely within these time-

settled rules. The record clearly reflects that no federal question of substance was properly raised at any stage of the proceedings in the lower Courts. At the trial level, this is demonstrated by the stipulation of the parties at the pretrial conference concerning the issues to be tried. (R. Vol. II, pp. 6-8). These issues were restated by the Chancellor in his Final Decree as follows:

> "The plaintiffs bring suit for specific performance of contract and the defendants rely upon the general denial and affirmative pleas of waiver and estoppel." (R. Vol. I, pp. 105-106; Petition, Appendix B, p. 25).

Further, the Chancellor's findings and Final Decree show that a federal question was not raised or considered. The decree was based solely on a construction of the agreement and the various other documents.

The only real question presented to the District Court of Appeal was whether the Trial Court erred in concluding that the agreement had been modified at the closing by the execution of the investment letter. (R. Vol. I, p. 108; Petition, Appendix B, pp. 26-27). The holding of the District Court was limited to the resolution of that question in favor of Respondents, with the exception that the District Court also concluded that an estoppel had not arisen by the execution of the letters and that the same did not constitute a waiver. (R. Vol. IV, pp. 4-5; Petition, Appendix B, pp. 22-23). Moreover, the Petitioners, in their Brief to that Court, defined the issue before the Court as being:

> "Was there competent substantial evidence be-

fore the trial court to support the legal conclusion reached in the Final Decree." (A. 13).

Further, the Petitioners did not cite one federal authority in their Brief to that Court. (A. 11-12). Clearly, then, there is no indication that a federal question of substance was either properly presented to or ruled upon by the Fourth District Court of Appeal of Florida.

It is also evident that no federal question was presented to the Florida Supreme Court by the Petition for Writ of Certiorari sought by Petitioners in that Court. This is clearly evinced by reference to Petitioners' Brief filed in support of their petition to that Court. As in their Brief to the District Court of Appeal, Petitioners' Points on Appeal did not allude to the existence of a federal question, nor did they cite a single federal authority to support the position which they now strenuously maintain. (A. 5-10).

In their Petition for Rehearing before the Florida Supreme Court, the Petitioners requested the Court to consider the points which they had urged in their previous petition and finally attempted to raise the existence of a federal question. The Florida Supreme Court denied the Petition for Rehearing without opinion. (R. Vol. IV, p. 8; A. 1).

It is clear, therefore, that in the case at bar, the purported federal question now urged by Petitioners was neither timely raised, presented to or ruled upon by the Florida Courts. This explains why the Petitioners have failed to comply with this Court's Rule 23(1)(f) which reads:

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court . . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

This also explains why the Petitioners, in an effort to sustain the jurisdiction of this Court, are forced to rely upon a footnote reference to their memorandum to the Trial Court (Petition, p. 7, n. 5), a document dehors the record and not submitted to the Trial Court until after the issues had been framed and tried.

The purported federal question relied upon by the Petitioners has been raised too late, and the Petition should be denied for that reason alone.

2. THERE IS NO FEDERAL QUESTION OF SUBSTANCE IN THIS CASE.

Section 5 of the Securities Act of 1933 makes it unlawful for anyone, by any interstate communication or use of the mails, to sell or deliver any security unless a registration statement is in effect. (15 U.S.C. § 77 e). Section 4(2) of that Act exempts from Section 5 transactions by any person other than an issuer, underwriter or dealer and transactions by an issuer not involving a

public offering—the so called "private offering exemption." [15 U.S.C. § 77d(1)].

In the case at bar, the trial court found that investment letters had been executed at the closing by the Respondents at the request of Petitioners. (R. Vol. I, pp. 106-107). The investment letters recited, after describing the Agreement, as follows:

> This will acknowledge that I have represented to and agreed with you that I am purchasing such shares for investment with no present intention of disposing of same, *subject only to my rights under such Agreement and Addendum.* (R. Vol. I, pp. 53-58; A. 19).[3]

Despite this language of the agreement wherein the parties expressly recognized that the Petitioners would be obliged to buy back the Royal American stock if it were not registered within six months, the Petition herein seeks to create the impression that the Petitioners were somehow deprived of their "federal right to rely upon investment letters executed by the purchasers of such securities at the time of sale * * * ." (Petition, p. 2). The plain fact of the matter is that the Florida state courts merely enforced the terms of the agreement and

---

[3]The reservation of rights contained in the quoted clause of the investment letter was consonant with the provisions contained in Paragraph 15 of the Agreement, which were as follows:

> (15) Any agreements to be performed by either of the parties as set forth in this Agreement shall survive the transfer of stock in this Agreement. All parties shall be required to perform all acts provided for by this contract even though the transfer of the stock has been made between the parties hereto; . . . (R. Vol. I, p. 15).

of the investment letters themselves. The Petitioners were not misled; they agreed to buy back the stock.

Moreover, by requiring Petitioner Royal American, the issuer, or, upon its failure to do so, Petitioner MacArthur, the guarantor, to reacquire the stock, the decision of the District Court of Appeal neither imputed to the parties an intent to violate the Securities Act, nor did it conflict with existing federal policy.

The principal and essential purpose of the Securities Act is to protect innocent purchasers by requiring registration with the Securities and Exchange Commission of certain information concerning securities offered for sale. *Gilligan, Will & Co.* v. *Securities and Exchange Commission*, 267 F. 2d 461, 463 (2d Cir. 1959); *Fuller* v. *Dilbert*, 244 F. Supp. 196, 213 (S. D. N. Y. 1962). Here, innocent purchasers are not endangered by enforcing the contract pursuant to the mandate of the District Court of Appeal. The stock is to be reacquired by the issuer, or, upon its failure, then by the guarantor, MacArthur. Thus, the effect of the lower courts' holding is nothing more than the enforcement of an arms length agreement between the parties. Clearly, the purpose of the Act can not be transgressed by reacquisition by the issuer or his guarantor. Such reacquisition can hardly be considered a public offering or further distribution in view of the plain import of the Act's purpose.

Furthermore, it is difficult to conceive how the ruling of the lower court can be construed as imputing to the parties an intent to violate the Securities Act, a contention which has strenuously been urged by Petitioners in their Petition to this Court. The only conceivable

manner in which such an effect can be imputed is if reacquisition by the issuer may be held to be a further distribution of the stock. However, a construction of the Securities Act to that effect would be incongruous. It is not the issuer which the Act protects, but rather the innocent and uninformed purchaser. An issuer, or a major stockholder, can hardly be considered synonymous with an innocent purchaser, especially in the circumstances of this case.

It is, therefore, submitted that this case presents no federal question of substance.

3. NO PUBLIC INTEREST WILL BE SERVED BY PERMITTING REVIEW OF THE LOWER COURT'S DECISION.

The decision below turns upon its own facts and will affect no one but the litigants. It is based upon the construction, pursuant to applicable Florida law, of an arms length transaction between the parties.

Also, the effect of the decision is to secure to the Respondents their rights under the agreement as contemplated by both Petitioners and Respondents. This is reflected in the record by an opinion letter written shortly before the closing to Petitioner Royal American by its own securities expert, the New York law firm of Simpson, Thacher & Bartlett. The pertinent portions of this letter are as follows:

> Our information with respect to this transaction, based on information supplied to us *by representatives of the Company*, is as follows:

> The Company proposes to issue 438,101 shares of its Common Stock to six stockholders of Fort Pierce Port & Terminal Co. (FORT PIERCE) in exchange for the 1,293,980 shares of FORT PIERCE stock owned by those stockholders. The Company has agreed to provide financing arrangements with respect to the payment of $383,371 of FORT PIERCE liabilities and has advanced the sum of $74,000 against these liabilities and an additional $25,000 of working capital. *The stock of the Company will be issued on a "restricted basis" for investment and the Company has agreed to proceed with the registration of the stock of the Company within sixty days after the closing of the transaction. If such registration is not effected within six months after the closing, the six stockholders have a right to demand redemption of the stock of the Company at $2.50 per share.* The FORT PIERCE stock is presently held in escrow. (R. Vol. I, pp. 99-100; A. 16-18).

It is thus apparent from this letter that the Petitioners' concept of this transaction was identical with that of the Respondents and the District Court of Appeal. It is also apparent that, at the closing, Petitioners were fully aware that notwithstanding the investment letter, they would be required under the Agreement to register the stock within six months or to repurchase the shares upon demand.

We respectfully submit that it is not in the public interest to permit Petitioners to evade their contractual commitment on a legal theory which directly conflicts

with the understanding of all parties concerned as formulated by the formal opinion letter rendered by Petitioners' own expert counsel prior to the consummation of the transaction.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Petition be denied.

Respectfully submitted,

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APPENDIX

1. Denial of Petition for Rehearing by Supreme Court of Florida

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM A. D. 1967
THURSDAY, JUNE 8, 1967

CASE NO. 35,723

ROYAL AMERICAN INDUSTRIES, INC., ET AL,
Petitioners

-vs-

DOLORES K. MURPHY, ET AL,
Respondents

On consideration of the Petition for Rehearing filed by Attorneys for Petitioners,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A TRUE COPY

TEST:
SID J. WHITE
Clerk Supreme Court

2. Denial of Petition for Writ of Certiorari by Supreme Court of Florida.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1967
WEDNESDAY, MARCH 29, 1967

CASE NO. 35,723
DISTRICT COURT OF APPEAL,
Fourth District

ROYAL AMERICAN INDUSTRIES, INC., et al.,
Petitioners,

vs.

DOLORES K. MURPHY, et al.,
Respondents.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

THORNAL, C. J., and THOMAS and CALDWELL, JJ., and TAYLOR and WILLIS, Circuit Judges, concur

ROBERTS, J., and McCORD, Circuit Judge, dissent

A TRUE COPY

TEST
SID J. WHITE
Clerk Supreme Court.

3. Denial of Petition for Rehearing by District Court of Appeal of Florida, Fourth District

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT
JULY TERM, 1966

CASE NO. 178

DOLORES K. MURPHY, JOHN E. MURPHY, HAROLD L. LANE and C. C. CALLAWAY as Co-Executors under the Last Will and Testament of M. E. MURPHY, et al.,

Appellants,

v.

ROYAL AMERICAN INDUSTRIES, INC. and JOHN D. MacARTHUR,

Appellees.

24 August 1966.

ORDERED that appellees' petition for rehearing filed 10 August 1966 is hereby denied.

A TRUE COPY

THOMAS THATCHER
CLERK

cc: Jones Adams Paine & Foster
O'Connell & Cooper
English McCaughan & O'Bryan
Scott McCarthy Preston & Steel
Burns Middleton Rogers & Farrell

4. Excerpts from Petitioners' Brief before the Supreme Court of Florida

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B. POINTS INVOLVED

POINT I

THE DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, IS IN DIRECT CONFLICT WITH THE FOLLOWING PRIOR DECISIONS OF THE SUPREME COURT OF FLORIDA REGARDING THE LEGAL DEFINITION OF "CONSIDERATION": **MANGUS v. PRESENT**, 135 So. 2d 417 (Fla. 1961); **TAMPA NORTHERN R. CO. v. CITY OF TAMPA**, 104 Fla. 481, 140 So. 311, 141 So. 298 (1932); **GUNBY v. DREW**, 45 Fla. 350, 34 So. 305 (1903); **ROBINSON v. HYER**, 35 Fla. 544, 17 So. 745 (1895); **SPANN v. BALTZELL**, 1 Fla. 301 (1847).

(The conflict with these decisions arises from the District Court's holding that there was no consideration to support the change or modification of the contract when in fact the necessary elements of consideration were present to meet the requirements of these cases.)

POINT II

THE DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, IS IN DIRECT CONFLICT WITH THE FOLLOWING PRIOR DECISIONS OF THE SUPREME COURT OF FLORIDA REGARDING THE ESSENTIAL ELEMENTS OF "ESTOPPEL": **STEEN v. SCOTT**, 144 Fla. 702, 198 So. 489 (1940); **ENSTROM v. DUNNING**, 136 Fla. 253, 186 So. 806 (1939).

(The conflict here arises in two respects, i. e., the District Court's determination that Plaintiffs were not estopped because they received no benefit, and secondly that the case cited as the controlling precedent by the District Court does not stand for the principle of law attributed to it.)

POINT III

THE DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, IS IN DIRECT CONFLICT WITH THE FOLLOWING PRIOR DECISIONS OF THE SUPREME COURT OF FLORIDA REGARDING PROOF OF "WAIVER": **MACINA** v. **MAGURNO**, 100 So. 2d 369 (Fla. 1958), and **MASSER** v. **LONDON OPERATING CO.**, 106 Fla. 474, 145 So. 72 (1932).

(The conflict arises here in two respects, i. e., the showing of an intentional relinquishment of a known right does not have to be express, as held by the District Court, but may be inferred from conduct or acts putting one off his guard and leading him to believe that a right has been waived; and secondly, the case cited as controlling precedent by the District Court does not stand for the principle of law attributed to it.)

POINT IV

THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, ABANDONED ITS PROPER APPELLATE FUNCTIONS BY RE-WEIGHING AND RE-EVALUATING THE EVIDENCE, IN DIRECT CONFLICT WITH THE FOLLOWING PRIOR DECISIONS OF THE SUPREME COURT AND OTHER DISTRICT COURTS OF APPEAL: **TREASURE, INC. v. WHITE STAR REALTY CO.**, 101 So. 2d 866 (Fla. 1958); **FIRST ATLANTIC NATIONAL BANK OF DAYTONA BEACH v. COBBETT**, 82 So. 2d 870 (Fla. 1955); **CUTRI ENTERPRISES, INC. v. PAN AMERICAN BANK OF MIAMI**, 115 So. 2d 592 (2d DCA Fla. 1959); **CAROLINA LUMBER CO. v. DANIEL**, 97 So. 2d 156 (1st DCA Fla. 1957); **PERRY v. PERRY**, 97 So. 2d 152 (3d DCA Fla. 1957); **SALTER v. KNOWLES**, 97 So. 2d 138 (2d DCA Fla. 1957).

(The conflict arises here because the District Court of Appeal made its own independent findings of fact and substituted its judgment for that of the Chancellor, rather than confining its review to a determination of whether the decision of the Chancellor was supported by competent substantial evidence, as required by the law of Florida and rules of this Court.)

POINT V

THE DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, PRECLUDING THE CHANCELLOR FROM RULING ON DEFENSES RAISED AT THE TRIAL BUT NOT DECIDED BY THE TRIAL COURT, IS

IN DIRECT CONFLICT WITH THE FOLLOWING PRIOR DECISIONS OF THE SUPREME COURT: MACINA v. MAGURNO, 100 So. 2d 369 (Fla. 1958); JOHNSTON v. JOHNSTON, 122 Fla. 372, 165 So. 698 (1936); McEWEN v. SCHENCK, 108 Fla. 119, 146 So. 839 (1933); STORY v. FIRST NATIONAL BANK & TRUST CO., 103 Fla. 399, 139 So. 179 (1931).

(The conflict arises here in that the defenses of waiver and estoppel were never decided by the trial court, yet the District Court directed the trial court to enter judgment for Respondents, thereby precluding the trial court from passing on these defenses, contrary to the law of Florida and rules of this Court.)

C. EXCERPT FROM STATEMENT OF THE CASE

In its decision, the District Court ruled on all three of Petitioners' defenses as follows:

(1) There was no consideration to support the modification of the contract; (A 6-7)

(2) There was no estoppel in that Plaintiffs (Respondents) received no benefit from the signing of the investment letters; (A 7)

(3) There was no waiver in that there was no showing of an intentional relinquishment of a known right. (A 7)

5. Excerpts from Petitioners' Brief before the District Court of Appeal of Florida, Fourth District

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Rader v. Prather(1930) 100 Fla. 591, 130 So. 15 — 6

United States Casualty Co. v. Godwin(1946) 158 Fla. 64, 27 So.2d 612 — 7

B. POINTS INVOLVED ON APPEAL

Appellants pose three questions which they deem to be the Points Involved in this appeal. We do not agree that the Points, so phrased, fairly present to this Court the real nub of the legal proposition before this tribunal. Mindful as we are of the limited right of review where an appellant seeks to reverse a trial Court's legal conclusions, and particularly where appellants would reverse the Chancellor's resolution of conflicting testimony, it appears to us the only real Point involved here is an extremely simple one, viz:

> WAS THERE COMPETENT SUBSTANTIAL EVIDENCE BEFORE THE TRIAL COURT TO SUPPORT THE LEGAL CONCLUSION REACHED IN THE FINAL DECREE?

The lower Court decided which of the witnesses he was going to believe, and, based on such resolution of conflicting testimony, reached a conclusion indicating that the affirmative defenses of the appellees had been established as a matter of law. The lower Court's judgment was, we contend, the only correct one.

6. Respondents' Assignments of Error filed in the Circuit Court of Fifteenth Judicial Circuit of Florida, in and for Palm Beach County

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY. IN CHANCERY NO. 63 Ç 1097-B

DOLORES K. MURPHY, JOHN E. MURPHY, HAROLD L. LANE and C. C. CALLAWAY as Co-Executors under the Last Will and Testament of M. E. MURPHY, M. A. RAMSEY, ROBERT ELMORE, JOSEPH C. MACKEY, WILLIAM ATWILL, JR., and GEORGE KENNEDY,
Plaintiffs,

vs.

ROYAL AMERICAN INDUSTRIES, INC. and JOHN D. MacARTHUR,
Defendants.

Plaintiffs, DOLORES K. MURPHY, JOHN E. MURPHY, HAROLD L. LANE and C. C. CALLAWAY as Co-Executors under the Last Will and Testament of M. E. MURPHY, M. A. RAMSEY, ROBERT ELMORE, JOSEPH C. MACKEY, WILLIAM ATWILL, JR. and GEORGE KENNEDY (originally the Defendants in the above styled action), file this their Assignments of Error and say:

1. The Lower Court erred in making and entering that certain "FINAL DECREE" dated January 5, 1965, and filed in the offices of the Clerk of the Circuit Court of Palm Beach County, Florida, on January 5, 1965, and re-

corded in Chancery Order Book No. 306 at Page 7 of said Circuit Court.

2. The Lower Court erred in rendering the Final Decree in the defendants' favor on the ground that the agreement of August 1, 1962, had been modified.

3. The Lower Court erred in its finding in said Final Decree that the agreement of August 1, 1962, was modified in writing at the closing with reference to the stock being freely tradeable and the time element of its registration.

4. The Lower Court erred in its finding in said Final Decree that at the time of the closing, the plaintiffs stated that they received the stock for investment purposes, with no present intention of selling or otherwise disposing of the same.

5. The Lower Court erred in its said Final Decree in failing to recognize that at the time of the closing, the plaintiffs accepted the stock subject to their rights under the agreement of August 1, 1962.

6. The Lower Court erred in its finding in said Final Decree that since there was no "present intention" of selling or disposing of the stock by the plaintiffs, the time element for registration was rendered indefinite.

7. The Lower Court erred in its finding in said Final Decree that Royal American proceeded with diligence in registering the stock.

7. Opinion Letter from Simpson, Thacher & Bartlett to Royal American Industries, Inc.

September 27, 1962

Royal American Industries, Inc.,
1001 Park Avenue
Lake Park, Florida

Dear Sirs:

You have requested our opinion as to whether or not the issuance of 438,101 shares of Common Stock of Royal American Industries, Inc. (the Company) to six of the present stockholders of Fort Pierce Port & Terminal Co. requires registration under the Securities Act of 1933, as amended (hereinafter called "Registration").

Our understanding with respect to this transaction, based on information supplied to us by representatives of the Company, is as follows:

The Company proposes to issue 438,101 shares of its Common Stock to six stockholders of Fort Pierce Port & Terminal Co. (Fort Pierce) in exchange for the 1,293,980 shares of Fort Pierce stock owned by those stockholders. The Company has agreed to provide financing arrangements with respect to the payment of $383,371 of Fort Pierce liabilities and has advanced the sum of $74,000 against these liabilities and an additional $25,000 of working capital. The stock of the Company will be issued on a "restricted basis" for investment and the Compay has agreed to proceed with the Registration of the stock of the Company within sixty days after the closing of the trans-

action. If such Registration is not effected within six months after the closing, the six stockholders have a right to demand redemption by the Company or by Mr. MacArthur of the stock of the Company at $2.50 per share. The Fort Pierce stock is presently held in escrow.

Our opinion is also based on the further understanding that:

(a) Since the Company issued an aggregate of 14,725,287 shares of its Common Stock to John D. MacArthur, Bankers and American Airmotive Corporation (the "Principal Stockholders") on December 22, 1961 in consideration for the conveyance to the Company of certain real property, the Company has not issued any shares of its Common Stock and the Principal Stockholders have not transferred or otherwise disposed of any shares of the Common Stock of the Company, except that one or more of the Principal Stockholders loaned certain shares of the Company's Common Stock to the Company for issuance for investment to certain stockholders of Southern Realty & Utilities Corp., and Bankers transferred Common Stock of the Company to three employees of Bankers who agreed to acquire such shares for investment.

(b) The Company does not contemplate the issuance in the near future of any shares of its Common Stock to persons acquiring such shares for investment in connection with transactions related to the transaction first outlined above, except that the Company does contemplate the issuance in the near future of an aggregate of 1,586,000 shares of its Common Stock in connection with two unrelated transactions. This understanding is based on the further assumption that the Securities and Exchange Commission

does not consider all or any of such transactions integrated so as to require Registration of any or all of the shares involved in such transactions. As we have previously advised you, if the Securities and Exchange Commission considers the above transactions to be parts or portions of a single integrated offering, it may require the Company to file a registration statement covering some or all of such transactions, and in addition it may require the Company to make a rescission offer. It is our further understanding that the Company contemplates the Registration of certain of the shares to be issued in connection with the transaction outlined above and of additional shares of its Common Stock to be issued in connection with transactions not related to those referred to above.

Based on the foregoing, we are of the opinion that the issuance of the Company's Common Stock in connection with the transaction outlined above will not require registration under the Securities Act of 1933, as amended, by reason of the provisions of Section 4(1) thereof.

In the event authorized but unissued Common Stock of the Company is used in such transactions (instead of shares borrowed by the Company from one or more of the Principal Stockholders), a listing application must be filed and approved by the American Stock Exchange prior to the issuance of any such authorized but unissued Common Stock.

Very truly yours,

/s/ Simpson Thacher & Bartlett

8. Investment Letter

Royal American Industries, Inc.
1001 Park Avenue
Lake Park, Florida

Dear Sirs:

I hereby acknowledge receipt of certificates Nos. CU253, CU254, CU256, CU257 and CU259 through CU284, inclusive, issued in the name of M. A. Ramsey and representing an aggregate of 78,024 shares of your common stock, par value of 10c per share, all pursuant to and in accordance with the provisions of that certain Agreement dated August 1, 1962, and that certain Addendum (to such Agreement) also dated August 1, 1962, both between you, John D. MacArthur, Fort Pierce Port & Terminal Co., a Florida corporation (the "Company"), me and five other stockholders of the Company and relating to the purchase by you and the sale by me and such other stockholders of shares of the common stock of the Company.

This will also acknowledge that I have represented to and agreed with you that I am purchasing such shares for investment with no present intention of selling or otherwise disposing of the same, subject only to my rights under such Agreement and Addendum.

Yours very truly,

s/ M. A. Ramsey (SEAL)

M. A. RAMSEY

Date: November 7, 1962

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief For Respondents In Opposition and Appendix has been served upon each of the following:

ROBERT M. ERVIN
For
Ervin, Pennington, Varn & Jacobs
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Tallahassee, Florida

and

BURNS, MIDDLETON, ROGERS & FARRELL
205 Worth Avenue
Palm Beach, Florida

attorneys for Petitioners, by mail, this 29TH day of September, 1967.

Phillip Goldman
Attorney for Respondents